IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0102
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
KEVIN MARK KENNEDY,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20050879

Honorable Barbara Sattler, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Kathryn A. Damstra
Tucson
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By Rose Weston
Tucson
Attorneys for Appellant

B R A M M E R, Judge.

¶1 A Pima County Superior Court jury found appellant Kevin Kennedy guilty of possession of marijuana, possession of drug paraphernalia, and possession of methamphetamine. The trial court suspended the imposition of sentence and placed him on

intensive probation for three years. On appeal, Kennedy contends that pursuant to a plea agreement in Oro Valley Magistrate Court that related to the same incident, he had already pled guilty to possession of drug paraphernalia and the possession of marijuana charge had been dismissed with prejudice. He therefore asks us to take judicial notice of the Oro Valley court's documents, find that the jury trial and convictions on the marijuana and drug paraphernalia counts violated his double jeopardy rights, and vacate the methamphetamine conviction because the jury verdict "was impermissibly tainted by the addition of the two improper counts." Because we decline to take judicial notice of the documents, we do not address his other issues.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against Kennedy. *See State v. Riley*, 196 Ariz. 40, ¶ 2, 992 P.2d 1135, 1137 (App. 1999). On February 9, 2005, an Oro Valley police officer observed a white pickup truck driving sixty-one miles per hour in a forty-five-mile-per-hour zone. The officer stopped the vehicle and later arrested Kennedy, the truck's passenger, for having an outstanding warrant and for giving false information to the officer. The officer then searched the passenger compartment of the vehicle. In a bag of food was a black zippered bag, which the officer opened. Inside the bag were marijuana, a metal pipe with marijuana residue on it, methamphetamine, and glass pipes with residue on them. Kennedy admitted the drugs were his.

¶3 On March 1, Kennedy was indicted by a Pima County grand jury for possession of methamphetamine, a class four felony, and possession of marijuana and drug paraphernalia, class six felonies. Kennedy was convicted of all three counts after a January 2006 jury trial. This appeal followed.

Discussion

¶4 Kennedy first asks this court to take judicial notice of the records of the Oro Valley Magistrate Court. He has attached to his opening brief what appear to be certified copies of the Oro Valley documents[1] and states we can order the Oro Valley court to send us certified copies in order to satisfy any concerns about the documents' authenticity. The state does not contend the documents Kennedy presents are false, but argues we should not take judicial notice of materials outside the record on appeal.

¶5 Rule 201, Ariz. R. Evid., 17A A.R.S. governs when a court may take judicial notice of adjudicative facts. It states a court may take judicial notice of a fact if it is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id*. An appellate court can "take judicial notice of anything of which the trial court could take notice, even if the trial court was never asked to take notice." *In re Sabino R*., 198 Ariz. 424, ¶ 4, 10 P.3d 1211, 1212 (App. 2000); *State v. McGuire*, 124 Ariz. 64, 65, 601 P.2d 1348, 1349 (App. 1978) (same).

[1]Kennedy also attaches what he purports is his "Arizona Traffic Ticket and Complaint" from this incident as an exhibit to his opening brief. Kennedy does not argue we should take judicial notice of this document, which is not in the record on appeal.

¶6 The state relies primarily on *State v. Schackart*, 190 Ariz. 238, 947 P.2d 315 (1997), to argue that we should not take judicial notice of the documents. In *Schackart*, our supreme court was asked by the state to take judicial notice of various court documents, including jury instructions, to establish the precise nature of a prior conviction to serve as an aggravating factor. *Id*. at 247, 947 P.2d at 324. These documents, however, had not been introduced at sentencing. *Id*. The court noted that "Arizona cases do not provide a clear standard for determining when an appellate court may take judicial notice of matters that were never presented to the trial judge," citing authority for both accepting and rejecting the request for judicial notice. *Id*.

¶7 The court stated that "[b]ecause [we] do[] not act as a fact-finder, we generally do not consider materials that are outside the record on appeal" and that "[w]ere we inclined to consider the late-presented documents in this case, we would first have to satisfy ourselves as to their authenticity, since we have been provided only photocopies of pages purportedly taken from various proceedings." *Id*. It also stated that, as an appellate court, it was "ill-equipped to resolve disputes over authenticity" and, therefore, "the customary way to prove a prior offense is by introducing appropriate documentary evidence in the trial court." *Id*. The court thus held:

> We see no reason to depart from this procedure, especially where life or death might literally hang in the balance. Regardless of the extent to which judicial notice may be appropriate in other contexts, therefore, we are not persuaded that it should be used at the appellate level to establish the existence of aggravating factors in a capital case.

Id.

¶8 Following *Schackart*, we decline to take judicial notice of the alleged court documents attached to Kennedy's brief. Although *Schackart* does not state an appellate court can never take judicial notice of trial court records, we are ill-equipped to determine their authenticity. And, in this situation, there may be another, better remedy for Kennedy, if not precluded; the state asserts that "[b]ecause adjudication of [Kennedy's] double jeopardy claim requires additional evidence, it would be more appropriately raised in a petition for post-conviction relief" under Rule 32, Ariz. R. Crim. P., 17 A.R.S.[2] Because we do not take judicial notice of the alleged Oro Valley court documents, Kennedy's two claims of error must fail on appeal, without the need to examine their merits.

¶9 We affirm Kennedy's convictions and sentences.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge

[2]Moreover, even were we to take judicial notice of the alleged Oro Valley court documents, those documents, standing alone, are insufficient proof that the Oro Valley convictions arose out of the same incident as the Pima County convictions. Although Kennedy's exhibit one, the purported traffic ticket, arguably suggests the two convictions stem from the same incident, Kennedy has not asked us to take judicial notice of this document even were it appropriate for us to do so. This is another reason why we decline to address Kennedy's double jeopardy issue on its merits.